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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TRUCK INSURANCE EXCHANGE
et al.,

Plaintiffs and Respondents,

v.

INSURANCE COMPANY OF THE
WEST,

Defendant and Appellant.

G028278

(Super. Ct. No. 774708)

O P I N I O N

Appeal from judgments of the Superior Court of Orange County, William F. McDonald, Judge. Affirmed.

Summers & Shives, Martin L. Shives and Peter B. Lightstone for Defendant and Appellant.

Cummings & Kemp, Thomas B. Cummings; Everett L. Skillman for Plaintiff and Respondent Truck Insurance Exchange.

Hawkins, Schnabel, Lindahl & Beck, Timothy A. Gonzales; Timothy A. Gonzales for Plaintiff and Respondent Golden Eagle Insurance Corporation.

Defendant Insurance Company of the West appeals from a stipulated judgment in favor of plaintiff Golden Eagle Insurance Company (Golden Eagle) in which defendant reserved its right to appeal, and a judgment in favor of coplaintiff Truck Insurance Exchange (Truck) arising after the court granted plaintiffs' motions for summary adjudication finding defendant had a duty to defend insured RCS Equities, Inc. (insured), a suspended corporation. Defendant asserts plaintiffs are collaterally estopped from relitigating the issue of whether it is obligated to contribute to the cost to defend a suspended corporation, and it was precluded by law from defending a suspended corporation. These assertions lack merit, and we affirm.

FACTS

The underlying facts are undisputed. Collectively, plaintiffs and defendant issued annual commercial general liability policies to insured, a roofing contractor, over a period of four years. Several years later, insured was named a party to a number of construction defect suits, and plaintiffs undertook the defense. Before plaintiffs' involvement, the Franchise Tax Board suspended insured's corporate status; insured was never reinstated. Based on the suspension, defendant refused to participate in or contribute to insured's defense.

Plaintiffs filed a complaint seeking a determination of defendant's duty to defend and indemnify the insured. Plaintiffs each filed a motion for summary adjudication against defendant. Essentially, the motions argued defendant had a duty to defend because the underlying construction defect lawsuits alleged facts sufficient to make a prima facie showing the claims fell within defendant's policy. Further, plaintiffs asserted insured's corporate suspension did not extinguish defendant's duty or prevent it from undertaking the defense. Defendant opposed the motions and also moved for summary adjudication. It maintained it had no duty to defend a suspended corporation in

contravention of state law and public policy, and it had no obligation to reimburse costs which plaintiffs voluntarily incurred by undertaking insured's defense.

The court found defendant's duty to defend was not precluded by insured's corporate suspension and granted plaintiffs' motions. Consequently, defendant entered into a stipulated judgment with Golden Eagle. Further, after defendant and Truck submitted the matter at trial, the court entered judgment in favor of Truck.

DISCUSSION

Collateral Estoppel

Defendant contends plaintiffs are precluded from arguing the merits of this appeal because the issue of an insurer's duty to defend a suspended corporation was previously litigated in action Golden Eagle and a third insurer brought against it. To support its position, defendant attached to its brief a copy of an unpublished opinion from that action. Defendant's contention appears to be an insincere attempt to circumvent rule 977(a) of the California Rules of Court which prohibits a party from citing to unpublished opinions.

Collateral estoppel prevents the relitigation of an issue where ““(1) the issue decided in a prior adjudication is identical with that presented in the action in question; and (2) there was a final judgment on the merits; and (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication.” [Citation.]” (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1482.) The unpublished opinion defendant relies upon fails to meet these criteria. While the legal issue here is the same as the issue decided in the unpublished opinion, the unpublished opinion is based on different factual circumstances irrelevant to the present proceedings; the unpublished opinion also concerns a different insured, a different insurance policy, and a duty to defend arising out of circumstances unconnected to this appeal. (See

Pacific Maritime Assn. v. California Unemp. Ins. Appeals Board (1965) 236 Cal.App.2d 325, 333-334; Rest.2d Judgments, § 28, com. b, pp. 275-276 [collateral estoppel is inapplicable where issue is one of law].) Truck was not a party to nor in privity with Golden Eagle in the prior action.

In light of these differences, it is obvious counsel had no reasonable argument collateral estoppel was an issue in this appeal. We considered sanctioning counsel for this improper conduct; in the interest of saving the court's time, we decline to do so. But counsel should be on notice that such conduct may be sanctionable.

Revenue and Taxation Code Section 19719

Former Revenue and Taxation Code section 19719 provided in part, "Any person who attempts or purports to exercise the powers, rights, and privileges of a . . . corporation which has been suspended . . . is punishable by a fine . . . or by imprisonment" (All further references are to this code.) Noting an ambiguity in the statute which purported to "prohibit[] insurance companies from defending actions brought against [a] suspended corporation" (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1950 (1997-1998 Reg. Sess.) Apr. 21, 1998, p. 5), the Legislature amended section 19719, effective January 1999, to specifically exclude insurers or counsel retained by an insurer from coming within the scope of the statute. Based on this revision to section 19719, defendant contends plaintiffs acted unlawfully by representing insured in the underlying actions prior to 1999 because insured was, and continues to be, a suspended corporation. Thus, defendant concludes, it would not be obligated to contribute to defense costs incurred by either plaintiff. We disagree.

The purpose of the amendment was to clarify the meaning of the statute and to prevent the kind of action defendant now asserts. The amendment served to protect a plaintiff's chance of recovery against the insurer of a suspended corporation. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1950 (1997-1998 Reg. Sess.)

Apr. 21, 1998, p. 5.) Defendant fails to cite any case law demonstrating former section 19719 has been interpreted to prohibit an insurer from defending actions against a corporation which was later suspended. Its reading of the statute does not further the underlying policy of the amendment. “We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made . . . changes in statutory language in an effort only to clarify a statute’s true meaning. [Citations.]” (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) Thus, we refuse to accept defendant’s interpretation of section 19719.

Equitable Contribution

Unlike a claim for equitable subrogation where an insurer steps into the shoes of the insured and cannot assert any greater rights than its insured, a claim for equitable contribution is independent of the rights of the insured and is based upon the obligation owed between two or more insurers covering the same loss. (See *Truck Ins. Exchange v. Superior Court* (1997) 60 Cal.App.4th 342, 349-350.) Here, defendant does not dispute it owed a duty to defend the underlying claims against insured. Plaintiffs satisfied their duty to defend and litigated the underlying claims. Independent of insured’s rights or status, the principles of equity demand defendant to contribute to the defense costs plaintiffs incurred when defendant failed to act. “Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others. [Citations.]” (*Fireman’s Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1293.)

Further, we decline to accept defendant's assertion the trial court erroneously found defendant owed Truck amounts exceeding its policy limits. The court held defendant had a duty to defend the underlying actions and was provided with a tender of defense, which it denied. It also noted defendant "act[ed] in disregard of its duties to its insured," and found that capping defendant's liability at policy limits would be "an unfair and inequitable result." We see no abuse of discretion. (See *CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 620.)

Additionally, we disagree with defendant's contention that Truck is not entitled to prejudgment interest. "[W]hen the exact sum of indebtedness is known or can be ascertained readily, the reason suggested for the denial of interest does not exist [citation]." (*General Insurance Co. v. Commerce Hyatt House* (1970) 5 Cal.App.3d 460, 474.) Defendant does not dispute the basis of the calculation of damages; it only challenges the amount. Thus, the court properly granted Truck prejudgment interest.

DISPOSITION

The judgments are affirmed. Respondents shall recover costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.